In the Supreme Court of the United States

October Term, 1978

No. 78-1566

LONG'S HAULING COMPANY, INC., a corporation,
Petitioner,

v.

HARRY HUGE, C. W. DAVIS and PAUL R. DEAN,
As Trustees of the United Mine Workers of America
Health and Retirement Funds,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Brief of Respondents in Opposition

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BRIEF OF RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The Opinions below are correctly set forth in the Petition

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition

COUNTERSTATEMENT OF QUESTIONS PRESENTED

The respondents do not accept the Statement of Question Presented as set forth in the Petition, and in lieu thereof set forth the following:

Whether, in an action to recover contributions due to a health and retirement fund established by a collective bargaining agreement, an employer may assert as a defense violations of Section 1 of the Sherman Act allegedly committed by

the union in negotiating the collective bargaining agreement, and by the trustees of the health and retirement fund, where the employer never raises any objection to the validity of the collective bargaining agreement prior to suit, and the employees have rendered services pursuant to the collective bargaining agreement.

COUNTER-STATEMENT OF THE CASE

A. Basis for Federal Jurisdiction in the District Court

The basis for federal jurisdiction of this case is section 301 of the Labor Management Relations Act of 1974, as amended, 29 U.S.C. §185, and also section 502 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1132.

B. Counter-Statement of Facts

The Petition does not accurately nor fully set forth the pertinent facts in the following respects:

Petitioner's proof as to the collective bargaining agreement relied upon by it as a defense was contradictory, at best. Although there was testimony as to an agreement entered into with the United Mine Workers of America (UMWA) in May of 1974, to extend to May of 1976, no written agreement was offered in proof thereof (R. 71a). This is apparently the agreement referred to on page 11 of the Petition. However, at the trial petitioner introduced into evidence a written agreement entitled "National Bituminous Coal Wage Agreement of 1971" (the "1971 Agreement") dated July 25, 1973 (R. 83a,

196a), which proveded that it was not subject to termination prior to November of 1974. The agreement on which respondents based this suit is the "National Bituminous Coal Wage Agreement of 1974" (the "1974 Agreement")(R. 48a,117a,181a) which stated that it "supersedes all existing and previous contracts. . ." (R. 169a) Petitioner never disavowed the 1974 Agreement until this suit was filed (R. 118a).

Appended to the 1971 Agreement was an eight page supplement which contained a provision specifically exempting petitioner from making contributions to the UMWA Health and Retirement Funds, which exemption ceased by its terms as soon as petitioner's employees became covered by the UMWA Health and Retirement Plan (R. 33A). And, petitioner's employees became covered upon petitioner's exe-

cution of the National Bituminous Coal Wage Agreement of 1974 (the "1974 Agreement") (R. 156a). Thus, the 1971 Agreement relied upon by petitioner contemplated that at some time in the future petitioner's employees would become covered by the UMWA Health and Retirement Plans, at which time petitioner had the right to terminate the private welfare and pension plan. The fact that petitioner did not choose to terminate the private plan could not, of course, relieve petitioner of its obligation to make the contributions it agreed to make in accordance with Article XX of the 1974 Agreement.

At the time petitioner was requested to sign the 1974 Agreement, petitioner attempted to include the same provision exempting petitioner from making contri-

butions to the UMWA Health and Retirement Funds. The UMWA, however, refused to agree to a continuation of the exemption, and despite such refusal petitioner consciously chose to enter into the 1974 Agreement which petitioner knew required it to make the very contributions which respondents seek to recover in this case (R. 116a - 117A).

The 1974 Agreement signed by petitioner also contained the following provision in Article XXVI(b):

> "This Agreement supersedes all existing and previous contracts except as incorporated and carried forward herein by reference, and all local agreements, rules, regulations and customs heretofore established in conflict with this Agreement are hereby abolished."

As pointed out by the trial court, petitioner never filed any unfair labor prac-

tice charge in respect to the actions of the UMWA leading up to the signing of the 1974 Agreement, and petitioner never raised any question as to its validity until respondents brought suit to compel petitioner to make the contributions which it agreed, in Article XX of the 1974 Agreement, to make to the UMWA Health and Retirement Funds.

Although the trial court offhandedly observed that the 1974 Agreement was "apparently ignored by everyone," (R. 208a), such is contrary to the record. Respondents were not, of course, parties to the 1974 Agreement, but as trustees they were charged with the enforcement of petitioner's undertaking to make contributions to the Health and Retirement Funds. Within six months of petitioner's signing of the 1974 Agreement, the re-

spondents sent petitioner two letters and one telegram, all requesting petitioner to file its monthly reports and to remit payments in accordance with the 1974 Agreement (R. 49a-55a, 182a), but petitioner ignored the requests (R. 52a, 184a). Finally, respondent's associate legal counsel called petitioner's President, who stated that he would have petitioner's legal counsel call respondents, but no such call was ever received. (R. 55a). Judge Rosenn, in his dissenting opinion (Pet. 24a) apparently relied on the District Court's unsupported observation in saying that petitioner had not waived its rights by failing to renounce the 1974 Agreement.

Nor was the 1974 Agreement ignored

by petitioner's employees. A grievance was filed by petitioner's employees in March of 1976, complaining, inter alia, of petitioner's failure to make contributions to the UMWA Health and Retirement Funds (R. 185a). And, of course, petitioner has always deducted union dues in accordance with the 1974 Agreement. (R. 120a) At no time prior to petitioner's filing of its answer did petitioner ever deny the validity of the 1974 Agreement (R. 118a, 120a).

Although petitioner's answer pleaded that the UMWA's purpose in insisting that petitioner sign the 1974 Agreement was to enforce a provision which, petitioner argues, prohibited any signatory from subcontracting any coal hauling to any non-signatory, petitioner did not offer

any evidence or proof whatever in support of that allegation, apparently being content to rely on the language of the provision itself to establish illegality.

Petitioner's statement, that "the UMWA's purpose in forcing Long to sign the 1974 National Agreement was to enforce Article II by restricting subcontracts for the transportation of coal to signatories of that Agreement" (Pet. 14) is simply not borne out by the record. First, no proof was offered by petitioner and the Court did not find, any "force" exerted upon petitioner. There is nothing in the record that would establish any activity by the UMWA other than would be normally incident to negotiation of a collective bargaining agreement, which fact is further established by peti-

tioner's never filing any unfair labor practice charge in respect to the 1974 Agreement (Pet. 33a).

It is remarkable that, although petitioner called an employee of Barnes & Tucker Coal Company (the producer for which petitioner was hauling coal) to testify, petitioner neither asked the witness nor presented any other proof that the particular contract provision of which petitioner complains was ever invoked by the UMWA as to Barnes & Tucker. Thus, there is a complete absence of proof in the record that petitioner's execution of the 1974 Agreement was in any way related to the UMWA's agreement with Barnes & Tucker, a fact that was certainly crucial to petitioner's antitrust defense.

Contrary to petitioner's representation that its employees received no benefits from the 1974 Agreement (Pet. 15, 16), under the terms of the 1974 Agreement petitioner's employees became immediately entitled to all of the benefits available to the employees of any other signatory to the 1974 Agreement, namely hospitalization, death benefits, and accrual of pension benefits (R. 55a, 160a). The footnote statement of page 16 of the Petition, to the effect that petitioner's employees would be required to "work a minimum of ten years . . . in order to receive any benefits from [the Health and Retirement Funds]" is a misrepresentation of the record. While an employee does need a minimum of 10 years in order to be entitled to <u>retirement</u> bene-

fits, each year of work for a signatory (whether with petitioner or some other signatory), is accrued toward eligibility, i.e., is "portable." (R. 58a, 59a) And, while earning retirement benefits petitioner's employees and his dependents were eligible for hospital and medical care benefits, and his family was eligible, in the event of his death, for Widow and Survivor's Benefits, all from the very day petitioner became a signatory to the 1974 Agreement. (R. 55a, 63a, 160a)

The decision of the trial court, which was affirmed by the Court of Appeals, granted respondents' request for a preliminary injunction requiring petitioner to comply with the terms of the 1974 Agreement. The 1974 Agreement has, since the entry of the trial court's

order, expired by its own terms (R. 169a), and petitioner is not a signatory to the successor agreement. The trial court's decision expressly recognized that its order did not preclude petitioner from its counterclaim against plaintiffs based upon alleged antitrust violations (Pet. 38a).

REASONS FOR NOT GRANTING THE WRIT

The decision of the Court of Appeals is wholly consistent with prior decisions of this Court denying an employer the right to raise, as a defense to an action to enforce the terms of a collective bargaining agreement, alleged illegal conduct on the part of a union in the course of contract negotiation. This policy has been followed so as to not deprive the employees (all of whom must be presumed

innocent of any wrongdoing) of the just compensation due them for their labor.

It should be borne in mind that the respondents did not negotiate the collective bargaining agreement. Rather, respondents are the trustees[1] of the UMWA Health and Retirement Funds established by the collective bargaining agreement to further compensate the employees through a Hospital and Medical Care program, death benefits for surviving spouses and dependents, and pensions for retired employees who attain the required service with any one or more of over 21,000 signatory employers. (R. 47a)

Although petitioner argues (Pet. 18)

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1. The collective bargaining agreement provided for three trustees, one appointed by the employers, one by the UMWA, and one "neutral" trustee chosen by the other two. (R. 47a, 159a)

that the Courts have permitted a defense that no collective bargaining agreement was intended by the parties, the cases relied upon by petitioner do not support this proposition. In Lewis v. Mears, 297 F.2d 101 (3d Cir. 1961), the Court ruled that an employer could prove by parol evidence that the union had not accepted the contract, while in the present case petitioner has freely admitted that it chose to sign the 1974 Agreement, knowing that its request for deletion of the provision requiring contribution to the health and retirement funds was unacceptable to the UMWA (R. 115a). An employer cannot unilaterally pretend to enter into a collective bargaining agreement so as to prevent strikes and then, when full liability under the agreement is asserted,

seek to disaffirm it. Lewis v. Cable, 107 F. Supp. 196 (W.D. Pa. 1952). Similarly, Lewis v. Lowry, 295 F.2d 197 (4th Cir. 1961), cert. denied, 368 U.S. 977 (1962) held that where both parties do not intend a collective bargaining agreement to be effective, the parol evidence rule does not preclude proof that neither party intended to make an agreement. But following remand, summary judgment was granted to the trustees, the Court of Appeals affirmed, holding that an employer could not, even if there were a misrepresentation by the union negotiator, remain silent. Absent a prompt renouncing of the collective bargaining agreement, the employer was obligated to make contributions to the UMWA Health and Retirement Funds. Lewis v. Lowry, 322 F.2d 453

(4th Cir. 1963). But here petitioner does not contend even that it did not intend to enter into an agreement, and never did renounce the 1974 Agreement, but simply argues that it should not be held to make the contributions to the UMWA Health and Retirement Funds required by the 1974 Agreement.

The decisional law of this Court, and that which was followed by both the District Court and the Court of Appeals, is that an employer should not be permitted to set off against its employees any defense arising out of the conduct of a union in the negotiation of implementation of a collective bargaining agreement. Essentially, the reasoning has always been that to allow such defenses would be to punish the employee, by depriving the

employee of earned compensation, for the faults of the union representatives whose acts are the subject of the alleged defenses. See, e.g., Lewis v. Benedict, 361 U.S. 459(1960); Lewis v. Seanor, 382 F.2d 437 (3d Cir.), cert. denied, 390 U.S. 947(1967).

A. An Alleged Violation of the Antitrust Laws by a Union is Not a Defense to the Enforcement of Trustees' Rights to Have Contributions Made to Health and Retirement Funds Created by a Collective Bargaining Agreement

As pointed by the Court of Appeals' decision, (590 F.2d at 459), this Court has not favored antitrust based defenses to otherwise valid contracts. Kelly v. Kosuga, 358 U.S. 516(1959). The reasons underlying this policy are, two-fold. First is an unwillingness to allow a party to obtain the advantages of a con-

tract while disavowing its obligations or, as stated in the words of Mr. Justice Holmes, to prevent people "from getting other people's property for nothing when they purport to be buying it." Continental Wall Paper Co. v. Louis Voight & Sons Co., 212 U.S. 271(1909). Second, the Sherman Act itself gives an injured party treble damages in the event of a proven violation, and the judiciary has been reluctant to add to that already harsh sanction a policy of non-enforcement of contracts when such policy is not provided for in the Sherman Act. Kelly v. Kosuga, supra.

Lewis v. Benedict, 361 U.S. 459 (1960), held that an employer cannot escape its obligation to make payments to the trustees of the health and retirement

funds because of the union's conduct. In Benedict the employer asserted as a defense the alleged breach of the collective bargaining agreement by the union. Mr. Justice Brennan, in holding such a defense to be ineffective as to the trustees, observed that the trustees had not negotiated the agreement and had made no promises, and hence were not in breach. The Court held:

> "Benedict promised in the collective bargaining agreement to pay a specified scale of wages to employees. It would not be contended that Benedict might recoup its damages by decreasing these wages. . . . the covenant to pay wages is included in separate contracts of hire entered into with each employee. The royalty payments are really another form of compensation to the employees, and as such the obligation to pay royalty might be thought to be incorporated into the individual contracts." 360 U.S. at 469

While the Court of Appeals observed that the trustees in this case "seek to enforce [petitioner's] promise prospectively as well as retrospectively," such is no longer the case. Subsequent to the entry of the lower court's preliminary injunction, the collective bargaining agreement to which petitioner was a party has expired by its own terms. (R. 169a, Art. XXX)

Lewis v. Seanor Coal Co., 382 F.2d 437 (3d Cir. 1967), cert. denied, 390 U.S. 947(1968), involved the identical situation as exists in this case. Seanor argued, as petitioner does here, that the collective bargaining agreement violated the Sherman Act, and that such violation relieved it of its contractual duty to pay royalties to the trustees of the wel-

fare and retirement funds. The defense was rejected as a matter of law, the Court holding:

> "it is particularly requisite in a case such as this not to allow the possible invalidity of a provision which is not operative as to these parties to afford a basis for non-compliance with a valid obligation, for the Supreme Court has pointed out that royalty payments into a welfare fund which are bargained for have the characteristics of compensation to the workers for their services." 382 F.2d at 440, 441.

The particular defense before the Court in the Seanor case was that one of the provisions in the collective bargaining agreement was a "hot cargo clause." The Court concluded that the remedy argued by the employer was not a defense to the Trustees' action:

> "The company's claim that the agreement violates the Sherman Anti-trust Act is not a defense to the Trustee's action. It is now well established that the remedy for violation of the anti-trust law is not avoidance of payments under a contract, but rather the redress which the anti-trust statute establishes, - a private treble damage action. Kelly v. Kosuga, 358 U.S. 516 ...(1959); Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743...(1947)." 382 F.2d at 441

See also, Mullins v. Reitz Coal Co., U.S. District Court, D. C., Civil Action No. 78-715; Mullins v. Kaiser Steel Corp., U.S. District Court, D.C., Civil Action No. 78-0650; United States Steel Corp. v. UMWA, U.S. District Court, D.C., Civil Action No. 75-1966

Petitioner has argued (Pet. 23) that the respondents were parties to some illegal conspiracy, but offered no proof of

this whatever at the trial.[2] Nowhere in the record did petitioner offer any proof that it entered into the 1974 Agreement because of the provision of which it now complains. But even if such were the case (which it is not), no reason exists why the penalty for such should be placed on petitioner's employees, which is what petitioner effectively seeks to accomplish

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2. Petitioner, in footnote 5, page 14, states that the provision relied upon by it to establish illegality has already been held to be illegal, citing UMW, Local 1554 (Amax Coal Co.), 23 NLRB No. 214(1978). That decision is presently pending an appeal to the United States Court of Appeals for the Third Circuit at Docket No. 78-2489. Provisions of this type have been generally held valid where work preservation purposes exist. National Woodwork Mfrs. Assoc. v. N.L.R.B., 386 U.S. 612(1967); Larry V. Muko, Inc. v. Trades Council, 47 U.S.L.W. 2129 (3d Cir. 8/11/78); Sheet Metal Workers International Assoc. v. N.L.R.B., 498 F.2d 687 (D.C. Cir. 1974)

by depriving its employees of so much of their compensation as is in the form of royalties used to purchase hospitalization, death benefits, and retirement pensions. Lewis v. Mill Ridge Coals, Inc., 298 F.2d 552 (6th Cir. 1962). If an improper provision, the clause is severable from the balance of the 1974 Agreement (R. 169a, Art. XXX). Lewis v. Mill Ridge Coals, Inc., following the Benedict decision, rejected the contention that a failure of consideration resulted from the alleged misconduct of the Trustees, stating:

> "A fair reading of Benedict discloses the Court's purpose to give the ultimate beneficiaries of the welfare fund (the men who mined the coal and their dependents) a status that would insulate them from the consequences of a breach of the contract by either the

> Mine Workers Union, as promisee, or the trustees of the Fund, as fiduciaries, charged with administration of the fund." 298 F.2d at 557

See also, United States v. Carter, 353 U.S. 210(1957), where this Court held that the "labor agreements not only created" the obligation "to make the specified contributions, but simultaneously, created the right of the trustees to collect those contributions on behalf of the employees. . . .The Trustees stand in the shoes of the employees and are entitled to enforce their rights." 353 U.S. at 220.

Petitioner seeks a holding that the door should be opened to a whole series of new antitrust type defenses in actions to enforce an employer's duty to make contributions to its employees' welfare

funds. However, the federal courts have fashioned a body of substantive federal labor law which has precluded employers from doing just that, albeit not to petitioner's liking.

B. The Decisions of the District Court and the Court of Appeals are Consistent With Those of This Court and of Other Courts

Petitioner argues (Pet. 20) that this Court has consistently, allowed the assertion of an antitrust violation as a defense in a contract action, citing Continental Wall Paper Co. v. Louis Voight & Sons, 212 U.S. 227(1909). On the contrary, the Continental Wall Paper Co. case "is the only action on a contract in which the Supreme Court has sustained the defense of antitrust illegality." Comment, "The Defense of Antitrust Illegality in Contract Actions," 27 U. Chi.

L. Rev. 758, 761(1960)[3]

The Continental Wall Paper Co. case, on which petitioner relies, is most noted for Mr. Justice Holmes' dissenting opin-

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3. The cases cited in petitioner's footnote as authority for its proposition do not support it. Kelly v. Kosuga, 358 U.S. 516(1959)(contract of sale separable from antitrust-violating agreement;defense denied); Bruce's Juices, Inc. v. Am. Can.Co., 330 U.S. 743(1947) (Robinson Patman violation no defense to action on notes given in connection with sale of goods); Response of Carolina v. Leasco Response, Inc., 498 F.2d 314 (5th Cir.), cert. denied, 419 U.S. 1050(1974) (antitrust defense not available in action to enforce contract which did not further prohibited activities); Farbenfabriken Bayer, A.G. v. Sterling Drug, Inc., 307 F.2d 207, 210 (3d Cir., 1962), cert. denied, 372 U.S. 929 (1962) (defense allowed in action to recover share of profits resulting from breach of antitrust laws); Tampa Electric Co. v. Nashville Coal Co., 276 F.2d 766 (6th Cir. 1960), reversed, 365 U.S. 320 (1961) (lower court decision that contract violated Clayton Act, and hence was unenforceable, reversed).

ion, in which he stated that "the policy of not furthering the purposes of the [agreement in restraint of trade] is less important than the policy of preventing people from getting other people's property for nothing when they purport to be buying it." 212 U.S. at 270,71. The same policy, so well enunciated in dissent, applies here where petitioner received the benefit of the entire 1974 Agreement, from its signing to its expiration, and now seeks to avoid payment of a portion of the compensation bargained for on behalf of petitioner's employees, namely the contributions to the health and retirement funds managed by the respondents.

The decision of the Court of Appeals and of the District Court simply follows,

with little or no extension, the reasoning of Lewis v. Benedict, 361 U.S. 459 (1960), Lewis v. Seanor Coal Co., 382 F.2d 437 (3d Cir. 1967), cert. denied, 390 U.S. 947(1968) and Lewis v. Mill Ridge Coals, Inc., 298 F.2d 552 (6th Cir. 1962). The holding of those cases is that a claim which an employee may have against a union or the trustees of the Health and Retirement Funds is not a defense to a claim which is, in substance, to recover compensation due to employees. Petitioner's employees should not be punished for the alleged sins of the union negotiators nor for the alleged sins of the trustees in violating the antitrust laws. If a violation of the antitrust laws has been committed by them, the union or the trustees are amenable to the harsh sanctions of treble damages imposed

by those laws.

While the concurring opinion of Judge Adams observes that Kelly v. Kosuga, 358 U.S. 516(1959), would "seem" not to preclude the assertion of an antitrust defense here, the observation was not only not part of the Court's decision affirming the District Court, but was clearly unjustified in the statement that the petitioner received no quid pro quo for its undertaking to make contributions to the health and retirement funds. Judge Adams did not explain why he felt a quid pro quo was lacking, but there was certainly as much consideration moving to the petitioner for the 1974 Agreement as there is in respect to any other collective bargaining agreement.

The proof of petitioner was contradictory as to the collective bargaining agreement on which petitioner relied. Although there was testimony that petitioner had entered into an agreement with the UMWA in May of 1974, which was to extend to May of 1976 (R. 71a), no written agreement was offered into evidence, and hence such must be disregarded under section 302(e)(5), 29 U.S.C. §186(c)(5), of the Labor Management Relations Act. Lewis v. Seanor Coal Co., 382 F.2d 437, (3d Cir.), cert. denied, 390 U.S. 947(1967). Petitioner later (R. 83a) introduced into evidence a written agreement dated July 25, 1973 (R. 196a), which provided that it was not subject to termination prior to November of 1974. The 1974 Agreement on which the respondents based this suit

was executed by petitioner in February, 1975 (R. 117a, 181a), which Agreement stated that it "supersedes all existing and previous contracts except as incorporated and carried forward herein. . ." (R. 169a, Art. XXVI §9b)). Petitioner never disavowed the 1974 Agreement until this suit was filed. (R. 118a) Hence, to the extent any inconsistency existed between the agreements, the most recent agreement, the 1974 Agreement, would control. Bechtel Corp. v. Local 215, Laborers' International Union, 544 F.2d 1207 (3d Cir. 1976).

Petitioner urges that this case differs from Lewis v. Benedict and Lewis v. Seanor Coal Co., because, according to the petition (p. 22), in neither Benedict nor Seanor did the employee have

a plausible argument that the whole collective bargaining agreement was invalid, stating that in both Benedict and Seanor the effect of allowing the defense would have been to deny petitioner's employees part of the compensation for their services. This is nonetheless true here. The sine qua non essential to this petitioner's argument is lacking, namely, wrongdoing on the part of the employees who will be affected by a ruling allowing the defense of an alleged violation of the antitrust laws.[4]

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4. Petitioner offered no evidence whatever that the petitioner executed the 1974 Agreement because of any illegal action of respondents, nor on the part of the union. The only possible basis for such an assertion on the record is that the UMWA (not the respondents) had not given 60 days' notice prior to the union's

(fn. cont'd)

Petitioner executed the 1974 Agreement with full knowledge that it would be required to make contributions to the health and retirements established by the collective bargaining agreement. (R. 117a). Petitioner was content to accept the labor peace that followed as a result of signing the 1974 Agreement and never, ever, raised any objection to it until this suit was filed. A threat of a strike is a lawful instrument. American Steel Foundries v. Tri-City Central Trades Council, 257 U.S. 184(1921). The

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(fn. cont'd)

insistence that petitioner execute the then-current National Bituminous Coal Wage Agreement of 1974. Petitioner apparently abandoned such argument and the District Court held that the defense of failure to give 60 Days' notice had been waived or, if not waived, was barred by §10 of the National Labor Relations Act. (Pet. 35a)

threat of a strike cannot be used to avoid a contract, and does not constitute duress. Shipley v. Pittsburgh and L.E.R.R., 83 F. Supp. 722 (W.D. Pa. 1949) Now, after the petitioner's employees have rendered their services, and after the 1974 Agreement has expired by its own terms, petitioner seeks to disavow its obligation to make the contributions not because of anything supposedly done by the persons who are to benefit from those contributions, but because of some allegedly improper conduct, never proven, on the part of the UMWA negotiators, or because of some unspecified improper conduct by the respondents, as trustees of the health and retirement funds. Under all principles of estoppel, petitioner should not be permitted to now renounce

the burdens of a collective bargaining agreement of which it enjoyed the benefits for nearly three years. Lewis v. Lowry, 322 F.2d 453 (4th Cir. 1963)

The decisional law of this Court, and of the other courts of the federal system, have consistently refused to allow as a defense the allegedly improper conduct of a union in negotiating a collective bargaining agreement in an action to recover contributions due to a health and welfare fund created in the collective bargaining agreement for the benefit of the employees.

Conclusion

An action brought by the trustees of a health and retirement fund is not the appropriate setting for the litigation of petitioner's claims of alleged violations

of the antitrust laws by the UMWA and the respondents, nor for the alleged commissions of unfair labor practices by the UMWA. The antitrust laws allow the recovery of treble damages for their violations, and the National Labor Relations Act provides specific remedies for an employer injured by unfair labor practices.

No sound reason exists as to why an employer should be given a further sanction in the form of a set off against, or avoidance of, contributions due to the employees, to fund health and retirement funds created exclusively for the benefit of petitioner's employees and the employees of other signatories. In the words of Chief Judge Seitz, in writing the opinion of this case in the Court of Appeals for the Third Circuit:

> "The rule that Long seeks would allow any plaintiff to bootstrap itself into a position to litigate in district court claims within the NLRB's primary jurisdiction simply by adding unrelated antitrust allegations." 590 F.2d at 461

The petition for writ of certiorari should be denied.

Respectfully submitted

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